

that its title to and interest in the land alienated to it for a term of 99 years would continue definitely for the full period of that term and without restriction, as the company's tenure was at all times subject to the provisions of the Code including those relating to forfeiture for breach of condition of title and failure to pay the rent due. We would add that the indiscriminate reference to and reliance on authorities pertaining to encouragement, acquiescence and promissory estoppel in the court below in this regard without any consideration as to the context of their application and applicability in the circumstances of the case would appear to be like an exercise in attempting to fix window grilles to a drive-in movie.

THE RESULT

There can in the premises only be one possible answer to the primal question posed in these proceedings and signified in the prelude hereto — a negative one. We accordingly at the conclusion of argument allowed the two related appeals by the Collector with costs and set aside the order of the learned Chief Justice made on March 6, 1979 except that part of his order directing the bank and the company to pay to the Collector the taxed costs of their motions which now stand dismissed. We also ordered that the sum of \$434,285 paid by the bank to the Collector for the years 1977 to 1979 pursuant to the order of the court below be refunded to the bank and further directed that the deposit in court by way of security be paid out to the Collector.

Appeals allowed.

Solicitors: *Allen & Gledhill; Cheang Lee & Ong.*

T. WALL & SONS LTD. & ANOR. v. RASA SAYANG ICE CREAM (sued as a firm) & ANOR.

[O.C.J. (Vohrah J.) February 6, 1980]

[Kuala Lumpur — Civil Suit No. 1540 of 1978]

Practice & Procedure — Stay of proceedings allowed on balance of convenience.

Trademarks — Claim of infringement — Defendants' application for registration — Plaintiffs' notice of opposition to said application pending — Stay of proceedings allowed.

By an agreement entered into on May 10, 1968 the first plaintiffs gave the second plaintiffs registered user rights to manufacture and sell ice-cream under their word and logo trademarks bearing the distinctive features of (i) 5 vertical stripes, (ii) an oval on the stripes, and (iii) the word "Walls" inside the oval. From 1973 the first defendant, and, subsequently from 1976, the second defendants manufactured and sold ice-cream in packages bearing an oval with the words "Rasa Sayang" bordered by designs made up of straight or curved lines. The plaintiffs alleged that the use of these trademarks by the defendants misled foreign tourists especially in Penang into mistaking the defendants' products for those of the plaintiffs as a result of which irreparable damage was suffered and continued to be suffered by the plaintiffs. The defendants claimed that their get-up with the word "Rasa Sayang" could not in any way be mistaken for that of the plaintiffs. The defendant also contended that on January 31, 1973 they had applied for registration of their words "Rasa Sayang" and their logo with the Registrar of Trade Marks, Malaysia and that their application had been accepted pending registration. On October 9, 1976 the plaintiffs had filed a notice of opposition to the defendants' application with the Registrar of Trade Marks. This application was still pending.

A **Held:** (1) it would be unjust to decide on the merits of the case when the matter of the defendants' application was before the Registrar whose knowledge and experience in these matters should be allowed to be utilized to the full when considering the application and the objection thereto;

(2) no irreparable damage or great hardship would be occasioned to the plaintiffs if the defendants were not restrained pending the decision of the Registrar. Any steps to effect a speedy resolution of the dispute could better be taken by way of mandamus to compel a prompt decision by the Registrar and not by way of this suit which would preempt his discretion;

(3) on the balance of convenience, the interests of justice would be served by ordering a stay of all further proceedings in the action.

Case referred to:-

C (1) *Berlei (U.K.) Ltd. v. Bali Brassiere Co. Incorp.* [1970] R.P.C. 469.

CIVIL SUIT.

C. Abraham for the first and second plaintiffs.

Darshan Singh for the first defendants.

D *Zakaria bin Mohamed Saad* for the second defendants.

Vohrah J.: This was a notice of motion (*vide* Enclosure (15)) filed by the defendants to stay proceedings in respect of the plaintiffs' claim for alleged infringement of the plaintiffs' registered trade mark.

E By an agreement entered into on May 10, 1968 the first plaintiffs, a registered English company, gave the second plaintiffs registered user rights to manufacture and sell ice-cream under their word and logo trade marks bearing the following distinctive features:—

(i) five vertical stripes;

(ii) an oval on the stripes; and

(iii) the word "Wall's" inside the oval.

F From 1973 the first defendants, and, subsequently from 1976, the second defendants manufactured and sold ice-cream in packages bearing an oval with the words "Rasa Sayang" bordered by designs made up of straight or curved lines. The plaintiffs alleged that the use of these marks by the defendants misled foreign tourists especially in Penang into mistaking the defendants' products for those of the plaintiffs as a result of which irreparable damage was suffered and continued to be suffered by the plaintiffs. The defendants denied these allegations and averred that the distinctive feature of the plaintiffs' trade mark was the word "Wall's" whilst the defendants' get-up with the word "Rasa Sayang" could not in any way be mistaken for that of the plaintiffs. The defendants also averred that they had on January 31, 1973 applied for registration of their words "Rasa Sayang" and their logo with the Registrar of Trade Marks, Malaysia and that their application had been accepted pending registration. They also averred that since 1973 up to the commencement of the plaintiffs' action on May 18, 1978 they had expended large sums of money in advertisement without any action on the part of the plaintiffs to restrain them except for the filing on October 9, 1976 of a notice of opposition by the plaintiffs to the defendants' application with the Registrar of Trade Marks, that is, nearly two years after the application. This application was still pending before the Registrar. The defendants there-

fore contended that the making of any order by the court in granting the plaintiffs' application for an interim injunction would in fact pre-empt the Registrar from exercising his discretion in the performance of his functions in considering the defendants' application for registration of their get-up. They also filed several samples of the defendants' packages bearing their get-up (*vide* Enclosure 13)).

In the case of *Berlei (U.K.) Limited v. Bali Brasiere Company Incorporated*,⁽¹⁾ Megarry J. whilst addressing his mind to certain provisions of the English Trade Marks Act, 1938 and the English authorities relating thereto stated at page 477:—

"These cases establish, first, that *prima facie* a plaintiff who has alternative remedies open to him (whether in trade mark cases or otherwise) is entitled to choose his tribunal, and the defendant is not entitled to divert him from his chosen tribunal to some other tribunal of the defendant's choice. Second, the cases show that the matter is nevertheless one for the discretion of the court, and that if the court reaches the conclusion that the interests of justice would best be served by ordering a stay, then a stay there should be. In considering the interests of justice, plainly one must consider the claims of both parties."

In the present case I formed the view that a stay ought to be ordered for the following reasons. The defendants averred that they had expended, and this was not denied, large sums of money to advertise their products since 1972 and had in fact on January 31, 1975 applied for registration of the "Rasa Sayang" get-up. It was obvious that up to the date of the filing of the action on May 18, 1978 by the plaintiffs to restrain the defendants the defendants had actually been carrying on their trade. It seemed to me to be rather unjust to decide on the merits of the case when the matter of the defendants' application was before the Registrar whose knowledge and experience in these matters should be allowed to be utilized to the full when considering the application and the objection thereto. I did not think that it was right in any way to interfere with his discretionary functions by any order of the court at that time. I did not consider that irreparable damage or great hardship would be occasioned to the plaintiffs if the defendants were not restrained pending the decision of the Registrar. Any steps to effect a speedy resolution of the dispute, I thought, could better be taken by way of *mandamus* to compel a prompt decision by the Registrar and not by way of this suit which would pre-empt his discretion.

In all the circumstances I was of the view, having considered the balance of convenience which I thought favoured the defendants, that the interests of justice would be served by ordering a stay of all further proceedings in the action and accordingly so ordered with costs to be costs in the cause.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Tan Sri Abdul Aziz & Co.; Darshan Singh & Co.*

LOO FANG SIANG v. KETUA POLIS DAERAH, BUTTERWORTH

[O.C.J. (Arulanandom J.) March 31 & August 19, 1980]
[Penang — Originating Summons No. 598 of 1979]

Criminal Law and Procedure — Police report — Whether "public document" — Criminal Procedure Code (Cap. 6), s. 107.

The applicant in this case was involved in a road accident on January 6, 1979 when a motor cycle KH 8909 coming from the opposite direction encroached onto his path and collided into him. As a result of the accident he suffered serious injuries and had commenced legal proceedings against the rider of the motorcycle for damages. His solicitors applied to the respondent for "all the police reports, sketch-plan and key and photographs taken in connection with the aforesaid accident" and the respondent supplied them with all the relevant documents except the police report made by the rider of the motorcycle which had collided into the applicant. In reply to further requests by the applicant's solicitor for a copy of the said report the respondent claimed that he could not supply the report because the maker of that report was not a client of the applicant's solicitor. The applicant then applied to the present court for an order to compel the respondent to supply him with the said report as he required it to process his claim for damages against the rider of the said motorcycle.

Held, allowing the application: (1) a person who seeks to establish negligence on the part of someone who collided into him has a legitimate interest in knowing what the other person's version of the accident as given in his police report is;

(2) a public document is defined as "a document made for the purpose of the public making use of it." And that is exactly what police reports under section 107 of the Criminal Procedure Code are. If the right of the public to have access to public documents is to be limited or curtailed, then the legislature would have expressly so stated or it must be established that it is contrary to public interest. In the absence of such limitations, public documents must be treated as "public documents."

Case referred to:—

(1) *Anthony Gomez v. Ketua Police Daerah, Kuantan* [1977] 2 M.L.J. 24.

ORIGINATING SUMMONS.

V. Muthusamy for the applicant.

M. Pathmanathan (Federal Counsel) for the respondent.

Arulanandom J.: This was an application by the applicant for an order in the following terms:—

- A declaration that all informations recorded under section 107 of the Criminal Procedure Code (Cap. 6) are public documents;
- A declaration that the police report lodged by the rider of motorcycle No. KH 8909 on January 6, 1979 at Telok Ayer Tawar Police Station is a public document;
- A declaration that the applicant has a right to inspect the report of the rider of motorcycle No. KH 8909 and to a copy thereof on payment of fees;
- Costs.

The person cited as respondent was the Ketua Polis Daerah, Butterworth.

According to the affidavit filed in support of the application sworn to on November 23, 1979, the applicant was involved in a road accident on the Butterworth-Sungai Petani Road on January 6, 1979 when a motorcycle KH 8909 coming from the opposite